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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JOSEPH GIBSON and RUSSELL
SCHULTZ,

Plaintiffs,

v.

MIKE SCHMIDT, in his official capacity as
District Attorney of Multnomah County,
Oregon, MULTNOMAH COUNTY
DISTRICT ATTORNEY'S OFFICE, and
BRAD KALBAUGH, in his official
capacity as a Multnomah County Deputy
District Attorney,

Defendants.

No. 3:20-CV-01580-SB

**PLAINTIFFS' AMENDED
EMERGENCY MOTION FOR
EXPEDITED DISCOVERY**

(Expedited Hearing Requested)

I. MOTION

Plaintiffs Joseph Gibson and Russell Schultz move, pursuant to Rule 26(d) of the Federal Rules of Civil Procedure, for an order shortening the response time on the Request for Production of Documents attached hereto to a day at least five days in advance of the date this Court may set for any hearing on plaintiffs' separately-filed motion for a preliminary injunction restraining the unconstitutional criminal prosecutions of plaintiffs.

II. NOTICE AND EXPEDITED HEARING REQUEST

Plaintiffs provided notice on the morning of September 14, 2020, to the Multnomah County District Attorney's Office (MCDA) by email to Deputy District Attorney Brad Kalbaugh that Plaintiffs in this matter would soon be seeking a temporary restraining order and motion for expedited discovery. (Lee Decl. Ex. S filed herewith.)

Later in the day, Jeff Howes, the First Assistant to the District Attorney of MCDA sent an email to Mr. Buchal writing "I acknowledge receipt of these documents. As to the form of service, please allow me a day or so to respond to your question. We are awaiting response from Oregon DOJ regarding representation and I am hesitant to weigh in on an issue outside of my expertise." (*Id.* Ex. T)

III. MEMORANDUM IN SUPPORT OF MOTION

As detailed in the accompanying motion for emergency injunctive relief, the prosecution of Plaintiffs for felony riot is in bad faith, selective, and retaliatory, contrary to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1983, and 1985, being pursued to in retaliation for, and in order to deter, their exercise of First Amendment rights.

The accompanying motion and its supporting documents demonstrate multiple direct attacks upon plaintiff Joseph Gibson and upon his attorney by high-ranking political leaders in the City of Portland and Multnomah County relating to the exercise of First Amendment rights by Mr. Gibson and others. They demonstrate intervention by the political authorities into criminal prosecutions in Portland, and a serious bias on the part of the District Attorney.

The materials sought in the First Requests for Production of Documents to Defendants attached hereto as Exhibit 1 consist include documents directly related to plaintiff, the name under which has occasionally conducted events in the City of Portland ("Patriot Prayer"), and his principal political antagonist "Antifa" (Request No. 1)—whose members are generally protected by the District Attorney's extraordinary policy that, in substance, riot cases will no longer be pursued against them. The time period is narrowed to May 1, 2019 to the present.

In light of yesterday's report in the *Portland Tribune* that Mayor Wheeler's former chief of staff "sent a text message urging then-Chief Danielle Outlaw to do more to investigate and prosecute right-wing protestors,"¹ plaintiffs have added a Request 4A expanding the scope of expedited discovery sought to communications from the Mayor and his staff.

Evidence is also sought concerning other riot prosecutions pursued (or not pursued) by defendants since January 1, 2017 (Request Nos. 2, 5 & 6), documents relating to the development of the District Attorney's extraordinary policy (Request No.

¹ https://pamplinmedia.com/pt/9-news/480993-388103-portland-mayor-admonishes-police-chief-after-public-clash-over-tear-gas?wallit_nosession=1 (accessed 9/17/20).

3), documents concerning direct communications between the Mayor and defendants (Request No. 4).

These documents will obviously assist the Court in evaluating plaintiffs' claims of selective prosecution, putting into context just how unprecedented and outrageous defendants' misuse of prosecutorial power is here. Given the imminence of the scheduled criminal trial date (October 26, 2020), there is manifestly "good cause" for expedited discovery that outweighs any prejudice to defendants. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) ("Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party").

Conclusion

This Court should grant plaintiffs' request for expedited discovery.

DATED: September 17, 2020.

/s/ James L. Buchal

James L. Buchal, OSB No. 921618

MURPHY & BUCHAL LLP

*Attorneys for Joseph Gibson and Russell
Schultz*

/s/ D. Angus Lee

D. Angus Lee, WSB No. 36473

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No. 3:20-CV-01580-SB

**PLAINTIFFS' AMENDED FIRST
REQUESTS FOR PRODUCTION OF
DOCUMENTS TO DEFENDANTS**

Plaintiffs, under Federal Rules of Civil Procedure 34, request that Defendants
produce for inspection and copying the documents described in the following Requests.

Page 1: PLAINTIFFS' AMENDED FIRST REQUESTS FOR PRODUCTION OF
DOCUMENTS TO DEFENDANTS

EXHIBIT 1
PAGE 1 OF 1

Defendants shall make such production within thirty (30) days after service hereof, or such earlier time as the Court may order, at the law offices of Murphy & Buchal LLP, 3425 S.E. Yamhill Street, Suite 100, Portland, OR 97214, or at such other time and place as shall mutually be agreed by the parties.

DEFINITIONS & INSTRUCTIONS

1. These requests call for information (including any information contained in or on any document or thing, including but not limited to e-mails and text messages) that is available to defendants, or in their possession, custody, or control, including all information known or available to, or in the possession, custody, or control of, defendants' attorneys, agents, representatives, investigators, or any other person acting on behalf of defendants or under the direction or control of defendants, or their attorneys or agents. Please take notice that for individual defendants sued in their official capacities, this includes responsive information that resides on personal, unofficial devices.

2. If defendants withholds documents or things responsive, in whole or in part, to any request on any basis, please comply with Rule 26(b)(5) of the Federal Rules of Civil Procedure and also identify: (a) the privilege or immunity claimed; (b) the nature of the document or thing (letter, memorandum, notes, etc.); (c) its date; (d) its author(s) and recipient(s), if any; (e) each and every person who has seen such document or thing or a portion of such document or thing; and (f) a general description of the document or thing and its subject matter.

3. If you object to any request or part thereof, produce all documents and things to which your objection does not apply.

4. If in answering these requests you claim any ambiguity in either a request or a definition or instruction applicable thereto, identify in your response the language you consider ambiguous and state the interpretation you are using in responding.

5. If you or your attorneys know of the existence, past or present, of any document or thing described in any of these requests, but such document or thing is not presently in your possession, custody, or control or in the possession, custody, or control of your agents, representatives, or attorneys, you shall so state in response to the request, identify such document or thing in response to the request, and identify the individual in whose possession, custody, or control the document or thing was last known to reside. If such document or thing no longer exists, state when, how, and why such document or thing ceased to exist.

6. The singular form of a word shall be interpreted as plural and the plural form of a word shall be interpreted as singular whenever appropriate in order to bring within the scope of these requests any document or thing that might otherwise be considered beyond its scope.

7. If any of the documents or things cannot be produced in full, you are requested to produce them to the extent possible, specifying the reasons for the inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portion.

8. If any responsive documents or things have been destroyed or otherwise removed from your custody or control during the pendency of this lawsuit, please indicate such in response to the particular requests set forth below.

9. The obligation to provide the documents and things sought by these discovery requests is continuing within the requirements of Federal Rule of Civil Procedure 26(e).

10. The term "documents" as used herein is used in its broadest sense and includes, without limitation, the original and all non-identical copies (including drafts and those with any notations) of all documents of the types designated in Rule 34(a) of the Federal Rules of Civil Procedure and all writings and recordings as those terms are defined by Rule 1001 of the Federal Rules of Evidence.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Any and all documents or records generated or received by any defendant from May 1, 2019 to the present which contain any of the following terms: "Antifa," "Gibson" or "Patriot Prayer".

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

REQUEST FOR PRODUCTION NO. 2: Any and all criminal informations or indictments issued by the Multnomah County District Attorney's office from January 1, 2017 to the present containing a charge for "riot" in violation of ORS 166.015, together with documents sufficient to show the disposition or present status of each such criminal information or indictment, copies of any police reports concerning the incident or incidents giving rise to the riot charges, and copies of any factual summaries (e.g., sworn statements submitted in support of arrest warrants) prepared by the office concerning such incident or incidents.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

REQUEST FOR PRODUCTION NO. 3: All documents constituting, referring or relating to the non-prosecution policy issued by Multnomah County District Attorney Mike Schmidt on or about August 11, 2020, including but not limited to drafts of the policy, memoranda or other documents analyzing the policy, memoranda or other documents concerning the likely impact of the policy, and comments received concerning the policy.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

REQUEST FOR PRODUCTION NO. 4: Any and all communications between any representative of the Multnomah County District Attorney's office and Portland Mayor Ted Wheeler, any member of the Portland City Council, or any member of the Board of Commissioners of Multnomah County since January 1, 2017 other than communications addressing only budgetary matters.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

REQUEST FOR PRODUCTION NO. 4A: Any and all communications since January 1, 2017 between Mayor Ted Wheeler or any of his staff and any defendant, or the Portland Police Bureau, concerning the subject of arresting or prosecuting “right wing” or “far right” or “alt-right” or “white nationalist” protesters.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4A:

REQUEST FOR PRODUCTION NO. 5: Any and all requests for criminal charges sent by a police agency to the Multnomah County District Attorney's office, from May 1, 2019 to the present containing a request to charge "riot" in violation of ORS 166.015, together with documents sufficient to show the disposition or present status of each such criminal information or indictment, copies of any police reports concerning the incident or incidents giving rise to the riot charges, and copies of any factual summaries (e.g., sworn statements submitted in support of arrest warrants) prepared by the office concerning such incident or incidents.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

REQUEST FOR PRODUCTION NO. 6: Any and all case processing or tracking records from May 1, 2019 to the present showing that the Multnomah County District Attorney's office declined to prosecute "riot" in violation of ORS 166.015, together with documents sufficient to show the disposition or present status of each such criminal information or indictment, copies of any police reports concerning the incident or incidents giving rise to the riot charges, and copies of any factual summaries (e.g., sworn statements submitted in support of arrest warrants) prepared by the office concerning such incident or incidents.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

DATED: September 17, 2020.

/s/ James L. Buchal

James L. Buchal, OSB No. 921618

MURPHY & BUCHAL LLP

*Attorneys for Joseph Gibson and Russell
Schultz*

/s/ D. Angus Lee

D. Angus Lee, WSB No. 36473

(Pending Admission Pro Hac Vice)

Attorney for Joseph Gibson and Russell Schultz

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I electronically filed the foregoing PLAINTIFFS' AMENDED EMERGENCY MOTION FOR EXPEDITED DISCOVERY with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

I further certify that on September 17, 2020, I transmitted PLAINTIFFS' AMENDED EMERGENCY MOTION FOR EXPEDITED DISCOVERY by E-mail and by First class mail to the following parties:

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/s/James L. Buchal
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